CANCELLATION OF REMOVAL, SUSPENSION OF DEPORTATION, and FORMER SECTION 212(c) RELIEF

I. OVERVIEW

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") merged deportation and exclusion proceedings into a single new process called removal proceedings. *See Romero-Torres v. Ashcroft*, 327 F.3d 887, 889 (9th Cir. 2003). Individuals in removal proceedings may be able to avoid removal if they qualify for "cancellation of removal" relief under 8 U.S.C. § 1229b. Section 1229b provides for two forms of cancellation relief. *See Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1141 n.2 (9th Cir. 2002). One form of cancellation is for applicants who are lawful permanent residents, *see* 8 U.S.C. § 1229b(a), and the other form is for nonpermanent residents, *see* 8 U.S.C. § 1229b(b); *see also Romero-Torres*, 327 F.3d at 888 n.1. IIRIRA repealed two analogous forms of relief: section 212(c) relief, 8 U.S.C. § 1182(c) (repealed 1996), and suspension of deportation, 8 U.S.C. § 1254 (repealed 1996). Some individuals, as discussed below, remain eligible for suspension of deportation and former section 212(c) relief.

A. Continued Eligibility for Pre-IIRIRA Relief Under the Transitional Rules

Where the former INS commenced deportation proceedings before April 1, 1997, and the final agency order was entered on or after October 31, 1996, the IIRIRA transitional rules apply. *See Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997). Under the transitional rules, an applicant "may apply for the pre-IIRIRA remedy of suspension of deportation if deportation proceedings against her were commenced before April 1, 1997." *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 597 (9th Cir. 2002) (citing IIRIRA § 309(c)); *see also Martinez-Garcia v. Ashcroft*, 366 F.3d 732, 734 (9th Cir. 2004).

Cross-reference: Jurisdiction over Immigration Petitions, Commencement of Proceedings.

Despite the repeal of section 212(c), certain aliens remain eligible for relief. *See* 8 C.F.R. § 1003.44 (setting forth procedure for special motion to seek former section 212(c) relief) and 8 C.F.R. § 1212.3 (setting forth availability of former section 212(c) relief for aliens who pleaded guilty or nolo contendere to certain crimes); *see also INS v. St. Cyr*, 533 U.S. 289, 325 (2001) (holding that the elimination of § 212(c) relief had an "obvious and severe retroactive effect" on those who entered into plea agreements with the expectation that they would be eligible for relief).

Cross-reference: Section 212(c) Relief.

II. JUDICIAL REVIEW

A. Limitations on Judicial Review of Discretionary Decisions

The IIRIRA permanent and transitional rules limited judicial review over certain discretionary determinations. *See* 8 U.S.C. § 1252(a)(2)(B) (permanent rule); IIRIRA § 309(c)(4)(E) (transitional rule). Notwithstanding any limitations on judicial review over discretionary determinations set forth in 8 U.S.C. § 1252(a)(2)(B), the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005), explicitly provides for judicial review over constitutional claims or questions of law. *See* 8 U.S.C. § 1252(a)(2)(D) (as amended by § 106(a)(1)(A)(iii) of the REAL ID Act); *see also Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005) (mandate pending) (explaining that the REAL ID Act restored judicial review of constitutional questions and questions of law presented in petitions for review of final removal orders); *Cabrera-Alvarez v. Gonzales*, 2005 WL (Sept. 8, 2005) (holding that the court has jurisdiction to consider questions of statutory interpretation as they relate to discretionary denials of relief); *Martinez-Rosas v. Gonzales*, 2005 WL 2174477, at *2 (9th Cir. 2005) (holding that despite 8 U.S.C. § 1252(a)(2)(D) this court continues to lack jurisdiction to review discretionary hardship determinations).

Cross-reference: Jurisdiction Over Immigration Petitions, Limitations on Judicial Review of Discretionary Decisions.

B. Limitations on Judicial Review Based on Criminal Offenses

The IIRIRA permanent and transitional rules eliminated petition-for-review jurisdiction for individuals removable based on certain enumerated crimes. *See* 8 U.S.C. § 1252(a)(2)(C) (permanent rule); IIRIRA § 309(c)(4)(G) (transitional rule).

Effective May 11, 2005, however, the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005) amended 8 U.S.C. § 1252 by adding a new provision, § 1252(a)(2)(D), as follows:

> Judicial Review of Certain Legal Claims -
> Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

Although the REAL ID Act did not repeal 8 U.S.C. § 1252(a)(2)(C), the Ninth Circuit has construed 8 U.S.C. § 1252(a)(2)(D) as "repeal[ing] all jurisdictional bars to our direct review of final removal orders other than those remaining in 8 U.S.C. § 1252 (in provisions other than (a)(2)(B) or (C) following the amendment of that section by the REAL ID Act." *Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005) (mandate pending). In *Fernandez-Ruiz*, the court held that it is no longer barred by § 1252(a)(2)(C) from reviewing a petition on account of a petitioner's past convictions and, because in that case no other provision in § 1252 limited judicial review, the court concluded it had jurisdiction to consider the petition on the merits. *Id.*; *see also Parrilla v. Gonzales*, 414 F.3d 1038, 1040 (9th Cir. 2005) (concluding that the court had jurisdiction to review the merits of the petition for review despite petitioner's aggravated felony conviction); *Lisbey v. Gonzales*, 420 F.3d 930, 932 (9th Cir. 2005) (same).

Cross-reference: Jurisdiction Over Immigration Petitions, Limitations on Judicial Review Based on Criminal Offenses.

III. CANCELLATION OF REMOVAL, 8 U.S.C. § 1229b

Individuals placed in removal proceedings on or after April 1, 1997, may apply for a new form of discretionary relief called cancellation of removal.

A. Cancellation for Lawful Permanent Residents, 8 U.S.C. § 1229b(a) (INA § 240A(a))

Cancellation of removal under 8 U.S.C. § 1229b(a) is similar to former section 212(c) relief, and provides a discretionary waiver of removal for certain lawful permanent residents.

1. Eligibility Requirements

In order for a lawful permanent resident to qualify for cancellation of removal under 8 U.S.C. § 1229b(a), she must show that she: "(1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (3) had not been convicted of any aggravated felony." *Toro-Romero v. Ashcroft*, 382 F.3d 930, 937 (9th Cir. 2004) (internal quotation marks omitted).

Cancellation is available for permanent residents who are either inadmissible or deportable. *See* 8 U.S.C. § 1229b(a) (stating that "[t]he Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States"). The statute does not require a showing of extreme hardship or family ties to a United States citizen or lawful permanent resident. *See id.*

2. Aggravated Felons

Aggravated felons are ineligible for cancellation of removal. *See* 8 U.S.C. § 1229b(a)(3); *see also Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 909 (9th Cir. 2004). The classes of crimes defined as aggravated felonies are found in 8 U.S.C. § 1101(a)(43).

Cross-reference: Criminal Issues in Immigration Law, Aggravated Felonies.

3. Termination of Continuous Residence

The applicant's period of continuous residence ends upon the earlier of the following: (1) when the applicant is served with a notice to appear; or (2) when the applicant committed an offense referred to in section 1182(a)(2) (criminal grounds of inadmissibility) that renders him inadmissible, or removable under sections 1227(a)(2) (criminal grounds of deportability), or 1227(a)(4) (security grounds of deportability). *See* 8 U.S.C. § 1229b(d)(1).

a. Termination Based on Service of NTA

The date the notice to appear is served counts toward the period of continuous presence. *See Lagandaon v. Ashcroft*, 383 F.3d 983, 988 (9th Cir. 2004) (rejecting the government's contention that the period ends the day preceding the date the notice to appear is served). The precise times that the relevant events occurred are irrelevant. *Id.* at 992 ("hold[ing] that whether the ten-year physical presence requirement has been satisfied is a question that can be answered without recourse to 'fraction[s] of a day,' but only to dates").

b. Termination Based on Commission of Specified Offense

"[A]ny period of continuous residence or continuous physical presence in the United States shall be deemed to end . . . when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest." 8 U.S.C. § 1229b(d)(1); *see also Toro-Romero v. Ashcroft*, 382 F.3d 930, 937 (9th Cir. 2004) (remanding for determination of whether petitioner's burglary conviction constituted a crime involving moral turpitude, which would end his period of continuous residence for purposes of cancellation for lawful permanent residents).

The Ninth Circuit has not addressed whether the termination provision takes effect on the date the crime is committed, or on the date of conviction. The BIA has held that the time period ceases to accrue on the date the offense is committed, not the date of conviction. *See In re Perez*, 22 I. & N. Dec. 689, 693 (BIA 1999) (en banc); *cf. id.* at 701 (Guendelsberger, Member, dissenting) (stating that the natural reading of the statute "would terminate the period of continuous residence at the time a respondent is rendered inadmissible or removable," which in this case was the date of conviction). This court also has not addressed whether an offense that triggers removal, but not inadmissibility under 8 U.S.C. § 1182(a)(2), ends the accrual of time. *Cf. In re Campos-Torres*, 22 I. & N. Dec. 1289, 1292 (BIA 2000) (holding that "the plain language of section 240A(d)(1) also states that, as a prerequisite, an offense must be 'referred to in section 212(a)(2)' of the Act in order to stop accrual of time").

c. Military Service

An applicant who has served at least two years of active duty in the U.S. armed forces need not fulfill the continuous residence requirement. *See* 8 U.S.C. § 1229b(d)(3).

4. Exercise of Discretion

"Cancellation of removal . . . is based on statutory predicates that must first be met; however, the ultimate decision whether to grant relief, regardless of eligibility, rests with the Attorney General." *Romero-Torres v. Ashcroft*, 327 F.3d 887, 889 (9th Cir. 2003). The BIA has ruled that the factors relevant to determining whether a favorable exercise of discretion was warranted under former section 212(c) continue to be relevant in the cancellation context. *See Matter of C-V-T-*, 22 I. & N. Dec. 7, 11 (BIA 1998).

B. Cancellation for Non-Permanent Residents, 8 U.S.C. § 1229b(b) (INA § 240A(b)(1))

1. Eligibility

Cancellation of Removal for non-permanent residents under 8 U.S.C. § 1229b(b) is similar to the pre-IIRIRA remedy of suspension of deportation. To qualify for relief under the more stringent cancellation standards, a deportable or inadmissible applicant must establish that he or she:

> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application; (B) has been a person of good moral character during such period; (C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title (except in a case described in section 1227(a)(7) of this title where the Attorney General exercises discretion to grant a waiver); and (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. § 1229b(b)(1); *see also Lagandaon v. Ashcroft*, 383 F.3d 983, 985 (9th Cir. 2004); *Simeonov v. Ashcroft*, 371 F.3d 532, 535 (9th Cir. 2004) (comparing "more lenient requirements for suspension" with the stricter cancellation provisions); *Ramirez-Perez v. Ashcroft*, 336 F.3d 1001, 1003 n.3 (9th Cir. 2003); *Romero-Torres v. Ashcroft*, 327 F.3d 887, 889 (9th Cir. 2003).

2. Ten Years of Continuous Physical Presence

"To qualify for the discretionary relief of cancellation of removal, an alien must, as a threshold matter, have been physically present in the United States for a continuous period of no less than ten years immediately preceding the date of the application." *Lopez-Alvarado v. Ashcroft*, 381 F.3d 847, 850 (9th Cir. 2004). The date on which an application for cancellation is filed is not pertinent to the calculation of ten years of continuous presence. *See Lagandaon v. Ashcroft*, 383 F.3d 983, 989 (9th Cir. 2004). Rather, 8

U.S.C. § 1229b(b)(1)(A), which requires ten years of physical presence "immediately preceding the date of such application requires that the ten-year period be *the* period of presence–from among all the times the alien was in the United States–that immediately preceded the application." *Id.* at 989 n.7 (alteration and internal quotation marks omitted) ("rul[ing] out claims where aliens seek to rely on periods of physical presence not continuous with the period of presence during which they were placed in removal proceedings").

a. Standard of Review

The IJ's factual determination of continuous physical presence is reviewed for substantial evidence. *See Lopez-Alvarado v. Ashcroft*, 381 F.3d 847, 850–51 (9th Cir. 2004).

b. Start Date for Calculating Physical Presence

The start date for determining an alien's ten years of physical presence is the date of arrival in the United States. *See Lagandaon v. Ashcroft*, 383 F.3d 983, 992 (9th Cir. 2004). The date of arrival is included as part of the relevant time period. *Id.*

c. Termination of Continuous Physical Presence

The applicant's period of continuous presence ends upon the earlier of the following: (1) when the applicant is served with a notice to appear; or (2) when the applicant commits an offense referred to in section 1182(a)(2) (criminal grounds of inadmissibility) that renders him inadmissible, or removable under sections 1227(a)(2) (criminal grounds of deportability), or 1227(a)(4) (security grounds of deportability). *See* 8 U.S.C. § 1229b(d)(1).

(i) Termination Based on Service of NTA

An applicant's accrual of continuous physical presence ends when removal proceedings are commenced against them through the service of a

legally sufficient notice to appear. *See Garcia-Ramirez v. Gonzales*, No. 02-73543, 2005 WL 2045773, at *1 n.3 (9th Cir. Aug. 26, 2005) (per curiam) (explaining that the service of a notice to appear that failed to specify the date or location of the immigration hearing did not end the accrual of physical presence).

The date the notice to appear is served counts toward the period of continuous presence. *Lagandaon v. Ashcroft*, 383 F.3d 983, 988 (9th Cir. 2004) (rejecting the government's contention that the period ends the day preceding the date the notice to appear is served). The precise times that the relevant events occurred are irrelevant. *Id.* at 992 ("hold[ing] that whether the ten-year physical presence requirement has been satisfied is a question that can be answered without recourse to 'fraction[s] of a day,' but only to dates").

(ii) Termination Based on Commission of Specified Offense

"[A]ny period of continuous residence or continuous physical presence in the United States shall be deemed to end . . . when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest." 8 U.S.C. § 1229b(d)(1); *see also Toro-Romero v. Ashcroft*, 382 F.3d 930, 937 (9th Cir. 2004) (remanding for determination of whether petitioner's burglary conviction constituted a crime involving moral turpitude, which would end his period of continuous residence for purposes of cancellation for lawful permanent residents).

The Ninth Circuit has not addressed whether the termination provision takes effect on the date the crime is committed, or on the date of conviction. The BIA has held that the time period ceases to accrue on the date the offense is committed, not the date of conviction. *See In re Perez*, 22 I. & N. Dec. 689, 693 (BIA 1999) (en banc); *cf. id.* at 701 (Guendelsberger, Member, dissenting) (stating that the natural reading of the statute "would terminate the period of continuous residence at the time a respondent is rendered inadmissible or removable," which in this case was the date of conviction). This court also has not addressed whether an offense that

triggers removal, but not inadmissibility under 8 U.S.C. § 1182(a)(2), ends the accrual of time. *Cf. In re Campos-Torres*, 22 I. & N. Dec. 1289, 1292 (BIA 2000) (holding that "the plain language of section 240A(d)(1) also states that, as a prerequisite, an offense must be 'referred to in section 212(a)(2)' of the Act in order to stop accrual of time").

d. Departure from the United States

An applicant will fail to maintain continuous physical presence if he "has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days." 8 U.S.C. § 1229b(d)(2); *see also Lagandaon v. Ashcroft*, 383 F.3d 983, 986 n.1 (9th Cir. 2004) (noting that a twenty-day absence did not interrupt petitioner's period of continuous physical presence). The 90/180 day rule replaced the previous "brief, casual and innocent" standard for determining when a departure breaks continuous physical presence. *See Mendiola-Sanchez v. Ashcroft*, 381 F.3d 937, 939 (9th Cir. 2004).

The court has held that the 90/180 rule is not impermissibly retroactive when applied to petitioners who left the country for more than 90 days before IIRIRA's passage. *See Mendiola-Sanchez*, 381 F.3d at 941 (transitional rules case); *Garcia-Ramirez v. Gonzales*, No. 02-73543, 2005 WL 2045773, at *5 (9th Cir. Aug. 26, 2005) (per curiam) (permanent rules case).

Departure from the United States under a grant of voluntary departure breaks an applicant's continuous physical presence. *See Vasquez-Lopez v. Ashcroft*, 343 F.3d 961, 974 (9th Cir. 2003) (per curiam). The court is currently considering whether *Vasquez-Lopez* applies where Border Patrol agents return petitioners across the border, or prevent them from entering the United States, but there is no evidence that the petitioners accepted voluntary departure under a threat of removal proceedings. *See, e.g.*, *Tapia v. Ashcroft*, No. 03-74615 and *Tovar-Rodriguez v. Ashcroft*, No. 03-74096 (argued and submitted May 4, 2005).

e. Proof

An applicant may establish the time element by credible direct testimony or written declarations. *See Lopez-Alvarado v. Ashcroft*, 381 F.3d 847, 849, 855 (9th Cir. 2004) (noting that "the regulations do not impose specific evidentiary requirements for cancellation of removal"); *Vera-Villegas v. INS*, 330 F.3d 1222, 1225 (9th Cir. 2003) (discussing suspension of deportation). Although contemporaneous documentation of presence "may be desirable," it is not required. *Vera-Villegas*, 330 F.3d at 1225; *cf. Chebchoub v. INS*, 257 F.3d 1038, 1042 (9th Cir. 2001) (holding that an IJ may require documentary evidence when he either not believe the applicant or does not know what to believe); *Sidhu v. INS*, 220 F.3d 1085, 1090 (9th Cir. 2000) (same).

Note that the REAL ID Act of 2005 codified new standards regarding when the trier of fact may require corroborating evidence and governing the availability of such evidence. These standards apply to applications for relief from removal filed on or after May 11, 2005. The REAL ID Act also codified the standard of review governing the trier of fact's determination regarding the availability of corroborating evidence. This standard of review applies to all final administrative decisions issued on or after May 11, 2005.

f. Military Service

An applicant who has served at least two years of active duty in the U.S. armed forces does not need to fulfill the continuous physical presence requirement. *See* 8 U.S.C. § 1229b(d)(3).

3. Good Moral Character

a. Jurisdiction

A moral character finding may be based on statutory or discretionary factors. *See Kalaw v. INS*, 133 F.3d 1147, 1151 (9th Cir. 1997) (discussing suspension of deportation). The statutory "per se exclusion categories" are set forth in 8 U.S.C. § 1101(f), and are discussed below. The court retains jurisdiction over statutory or "per se" moral character determinations. *See, e.g., Gomez-Lopez v. Ashcroft*, 393 F.3d 882, 884 (9th Cir. 2005) (holding that court retained jurisdiction to review finding that alien could not establish good moral character for purposes of cancellation of removal under section 1101(f)(7)); *Moran v. Ashcroft*, 395 F.3d 1089, 1091 (9th Cir. 2005) (retaining jurisdiction over alien smuggling question). The court lacks jurisdiction to review moral character determinations based on discretionary factors. *See Kalaw*, 133 F.3d at 1151.

b. Standard of Review

"We review for substantial evidence a finding of statutory ineligibility for suspension of deportation based on a lack of good moral character." *Ramos v. INS*, 246 F.3d 1264, 1266 (9th Cir. 2001); *see also Moran v. Ashcroft*, 395 F.3d 1089, 1091 (9th Cir. 2005) (discussing cancellation of removal). Purely legal questions, such as whether a county jail is a penal institution within the meaning of 8 U.S.C. § 1101(f)(7), are reviewed de novo. *See Gomez-Lopez v. Ashcroft*, 393 F.3d 882, 885 (9th Cir. 2005).

c. Time Period Required

"In order to be eligible for cancellation of removal, [an applicant] must have 'been a person of good moral character' during the continuous 10-year period of physical presence required by the statute." *Moran v. Ashcroft*, 395 F.3d 1089, 1092 (9th Cir. 2005) (quoting 8 U.S.C. § 1229b(b)(1)(B)); *see also Limsico v. INS*, 951 F.2d 210, 213–14 (9th Cir. 1991) (declining to decide whether events occurring before the seven-year suspension period may be considered). For suspension cases, the BIA must make the moral character determination based on the facts as they existed at the time of the BIA decision. *See Ramirez-Alejandre v. Ashcroft*, 320 F.3d 858, 862 (9th Cir. 2003) (en banc).

d. Per Se Exclusion Categories

(i) Habitual Drunkards

"No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was . . . a habitual drunkard." 8 U.S.C. § 1101(f)(1); *see also Kalaw v. INS*, 133 F.3d 1147, 1151 (9th Cir. 1997).

(ii) Certain Aliens Described in 8 U.S.C. § 1182(a) (Inadmissible Aliens)

Section 1101(f)(3) provides that no person can be of good moral character if she is:

> described in paragraphs (2)(D), (6)(E), and (9)(A) of section 1182(a) of this title; or subparagraphs (A) and (B) of section 1182(a)(2) of this title and subparagraph (C) thereof of such section (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marihuana), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period.

8 U.S.C. § 1101(f)(3); *see also Avendano-Ramirez v. Ashcroft*, 365 F.3d 813, 816 (9th Cir. 2004) (holding that petitioner could not establish good moral character because she was described in 8 U.S.C. § 1182(a)(9)(A) as an "alien who has been ordered removed under section 1225(b)(1) of this title . . . and who again seeks admission within 5 years of the date of such removal.") (internal quotation marks omitted).

(A) Prostitution and Commercialized Vice

Section 1182(a)(2)(D) covers prostitution and commercialized vice.

(B) Alien Smugglers

Section 1182(a)(6)(E)(i) covers "[a]ny alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law." *Moran v. Ashcroft*, 395 F.3d 1089, 1092 (9th Cir. 2005) (internal quotation marks omitted); *see also Khourassany v. INS*, 208 F.3d 1096, 1101 (9th Cir. 2000) (holding that applicant who admitted that he paid a smuggler to bring his wife and child into the United States illegally in 1995 was statutorily ineligible for a good moral character finding for purposes of voluntary departure).

Section 1182(a)(6)(E)(ii) contains an exception to the smuggling provision in cases of family reunification, where an eligible immigrant, physically present in the United States on May 5, 1988, "encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law" before May 5, 1988. *Id.*; *see also Moran*, 395 F.3d at 1093–94.

The statute also provides for a discretionary waiver of the alien-smuggling provision. *See* 8 U.S.C. § 1182(a)(6)(E)(iii) (referencing discretionary waiver provision in 8 U.S.C. § 1182(d)(11)). This waiver may be invoked for "humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." 8 U.S.C. § 1182(d)(11). The family member waiver provision does not apply to a spouse who was not a spouse at the time of smuggling. *Moran*, 395 F.3d at 1094 (holding that alien who agreed to pay smugglers to help his son and future wife cross the border in 1993 was not eligible for cancellation of removal).

(C) Certain Aliens Previously Removed

Section 1182(a)(9)(A) covers "an alien who has been ordered removed under section 1225(b)(1) of this title . . . and who again seeks admission within 5 years of the date of such removal." *Avendano-Ramirez*

v. Ashcroft, 365 F.3d 813, 816, 817 (9th Cir. 2004) (noting that before IIRIRA, this statutory section referred to aliens who were coming to the United States to practice polygamy) (internal quotation marks omitted).

(D) Crimes Involving Moral Turpitude

Section 1182(a)(2)(A) covers "a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime." 8 U.S.C. § 1182(a)(2)(A); *see also Beltran-Tirado v. INS*, 213 F.3d 1179, 1185 (9th Cir. 2000) (holding that petitioner's offenses of making false attestation on employment verification form and using a false Social Security number were not crimes of moral turpitude barring a finding of good moral character for purposes of registry); *cf. Hernandez-Robledo v. INS*, 777 F.2d 536, 542 (9th Cir. 1985) (holding that the BIA was within its discretion in finding that petitioner's conviction for malicious destruction of property was a crime involving moral turpitude, barring good moral character for purposes of suspension).

(E) Controlled Substance Violations

Section 1182(a)(2)(A) also covers violations of "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 2)." 8 U.S.C. § 1182(a)(2)(A); *see also Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir. 1996) (per curiam) (holding that application of the bar for purposes of voluntary departure did not violate due process). The mandatory bar to good moral character does not apply to a "single offense of simple possession of 30 grams or less of marihuana." 8 U.S.C. § 1101(f)(3).

(F) Multiple Criminal Offenses

Section 1182(a)(2)(B) covers "[a]ny alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single

scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more." 8 U.S.C. § 1182(a)(2)(B); *see also Angulo-Dominguez v. Ashcroft*, 290 F.3d 1147, 1150–51 (9th Cir. 2002) (holding that petitioner with three convictions with aggregate sentences totaling over 10 years was ineligible for good moral character finding for purposes of registry).

(G) Controlled Substance Traffickers

Section 1182(a)(2)(C) covers "[a]ny alien who the consular officer or the Attorney General knows or has reason to believe . . . is or has been an illicit trafficker in any controlled substance or in any listed chemical." 8 U.S.C. § 1182(a)(2)(C). The Ninth Circuit has stated "that the plain language of the good moral character definition could be read to require a conviction for drug-trafficking in order to per se bar an alien from establishing good moral character." *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 827 (9th Cir. 2003) (discussing voluntary departure) (internal quotation marks omitted); *cf. Alarcon-Serrano v. INS*, 220 F.3d 1116, 1119 (9th Cir. 2000) (holding that conviction not required to establish inadmissibility as a drug trafficker); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1053 (9th Cir. 2005).

(iii) Gamblers

"[O]ne whose income is derived principally from illegal gambling activities," or "one who has been convicted of two or more gambling offenses committed during such period," shall not be regarded as a person of good moral character. 8 U.S.C. § 1101(f)(4) and (5); *see also Castiglia v. INS*, 108 F.3d 1101, 1103 (9th Cir. 1997).

(iv) False Testimony

An applicant who has given false testimony to obtain an immigration benefit is ineligible for relief which requires a showing of good moral character. *See* 8 U.S.C. § 1101(f)(6); *see also Abedini v. INS*, 971 F.2d 188,

193 (9th Cir. 1992) (discussing section in the context of voluntary departure). "For a witness's false testimony to preclude a finding of good moral character, the testimony must have been made orally and under oath, and the witness must have had a subjective intent to deceive for the purpose of obtaining immigration benefits." *Ramos v. INS*, 246 F.3d 1264, 1266 (9th Cir. 2001) (holding that false testimony to an asylum officer established lack of good moral character); *Bernal v. INS*, 154 F.3d 1020, 1023 (9th Cir. 1998) (holding that applicant's false statements made under oath during naturalization examination precluded finding of good moral character).

Whether or not a person has the subjective intent to deceive in order to obtain immigration facts is a question of fact reviewed for clear error. *United States v. Hovsepian*, No. 99-50041, 2005 WL 2127299, at *1 (9th Cir. Sept. 6, 2005) (en banc) (citing Fed. R. Civ. P. 52(a)). "When the court rests its findings on an assessment of credibility, we owe even greater deference to those findings [of fact]." *Id*.

(v) Confinement

A person cannot show good moral character if he "has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period." 8 U.S.C. § 1101(f)(7); *see also Rashtabadi v. INS*, 23 F.3d 1562, 1571–72 (9th Cir. 1994) (discussing good moral character in the context of voluntary departure). "[T]he plain meaning of the statute is that confinement in any facility–whether federal, state, or local–as a result of conviction, for the requisite period of time, falls within the meaning of § 1101(f)(7)." *Gomez-Lopez v. Ashcroft*, 393 F.3d 882, 886 (9th Cir. 2005) (holding that incarceration in a county jail falls within the meaning of the statutory exclusion). "The requirement that the confinement be as a result of a conviction precludes counting any time a person may have spent in pretrial detention." *Id.*

(vi) Aggravated Felonies

An applicant is statutorily ineligible for a finding of good moral character if he or she was convicted of an aggravated felony at any time. *See* 8 U.S.C. § 1101(f)(8). The classes of crimes defined as aggravated felonies are found in 8 U.S.C. § 1101(a)(43). *See also Castiglia v. INS*, 108 F.3d 1101, 1104 (9th Cir. 1997) (holding that petitioner's second degree murder conviction precluded a good moral character finding for purposes of naturalization).

The court has not addressed the tension between Section 509(b) of the Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978 (Nov. 29, 1990) (providing that the aggravated felony bar to good moral character applies to convictions on or after November 29, 1990) and Section 321(b) of IIRIRA, Pub. L. No. 104–208, 110 Stat. 3009 (Sept. 30, 1996) (amending aggravated felony definition to eliminate all previous effective dates).

Cross-Reference: Criminal Issues in Immigration Law, Aggravated Felonies.

(vii) Nazi Persecutors, Torturers, Violators of Religious Freedom

"[O]ne who at any time has engaged in conduct described in section 1182(a)(3)(E) of this title (relating to assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings) or 1182(a)(2)(G) of this title (relating to severe violations of religious freedom)," shall not be regarded as having good moral character. 8 U.S.C. § 1101(f)(9).

(viii) False Claim of Citizenship and Voting

"In the case of an alien who makes a false statement or claim of citizenship, or who registers to vote or votes . . . in violation of a lawful restriction of such registration or voting to citizens, if each natural parent of the alien . . . is or was a citizen . . . the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such statement, claim, or violation that he or she was a citizen, no finding that the alien is, or was, not of good moral character

may be made based on it." 8 U.S.C. § 1101(f); *see also Hughes v. Ashcroft*, 255 F.3d 752, 759 (9th Cir. 2001); *cf. McDonald v. Gonzales*, 400 F.3d 684, 685, 689-90 (9th Cir. 2005) (holding that petitioner was not an unlawful voter for purposes of removal because she did not have the requisite mental state).

(ix) Adulterers

"In 1981, Congress amended § 1101(f) to exclude adulterers from the enumerated categories." *Torres-Guzman v. INS*, 804 F.2d 531, 533 n.1 (9th Cir. 1986).

4. Criminal Bars

An applicant is ineligible for nonpermanent resident cancellation of removal if he or she has been convicted of an offense under 8 U.S.C. § 1182(a)(2) (criminal grounds of inadmissibility), 8 U.S.C. § 1227(a)(2) (criminal grounds of deportability), or 8 U.S.C. § 1227(a)(3) (failure to register, document fraud, and false claims to citizenship). *See* 8 U.S.C. § 1229b(b)(1)(C); *see also Gonzalez-Gonzalez v. Ashcroft*, 390 F.3d 649, 651–52 (9th Cir. 2004) (listing relevant offenses). Section 1229b(b)(1)(C) "should be read to cross-reference a list of offenses in three statutes," and "convicted of an offense under" means "convicted of an offense *described* under" each of the three sections. *Gonzalez-Gonzalez*, 390 F.3d at 652 (holding that inadmissible alien convicted of crime of domestic violence was ineligible for cancellation) (internal quotation marks omitted).

5. Exceptional and Extremely Unusual Hardship

Non-permanent resident applicants for cancellation of removal must establish "that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. § 1229b(b)(1)(D).

a. Jurisdiction

Pursuant to 8 U.S.C. § 1252(a)(2)(B)(i), the court lacks jurisdiction to review the agency's "exceptional and extremely unusual hardship" determination. *See Romero-Torres v. Ashcroft*, 327 F.3d 887, 888 (9th Cir. 2003) (holding that the "'exceptional and extremely unusual hardship' determination is a subjective, discretionary judgment that has been carved out of our appellate jurisdiction"). Notwithstanding this jurisdictional bar, however, the court retains jurisdiction to consider constitutional questions and questions of law. 8 U.S.C. § 1252(a)(2)(D) (as enacted by section 106(a)(1)(A)(iii) of the REAL ID Act of 2005). *See Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005) (mandate pending). The court retains jurisdiction to review questions of statutory interpretation. *See Cabrera-Alvarez v. Gonzales*, No. 04-72487, 2005 WL 2159038, at *3 (Sept. 8, 2005) (concluding that the court had jurisdiction to consider issues of statutory interpretation pertaining to agency's discretionary the hardship standard); *cf. Martinez-Rosas v. Gonzales*, No. 04-36150, 2005 WL 2174477, at *2 (Sept. 9, 2005) (holding that the court lacks jurisdiction to consider petitioner's non-colorable contention that the agency deprived her of due process by misapplying the applicable law to the facts of her case in evaluating exceptional and extremely unusual hardship).

The court has not yet decided whether it retains jurisdiction to review disputed factual issues underlying the BIA's hardship determination. *See Romero-Torres*, 327 F.3d at 891 n.5.

b. Heightened Hardship Standard Does Not Violate Due Process

The BIA's interpretation of the heightened "exceptional and extremely unusual hardship" standard does not violate due process. *Ramirez-Perez v. Ashcroft*, 336 F.3d 1001, 1006 (9th Cir. 2003) ("The BIA has not exceeded its broad authority by defining 'exceptional and extremely unusual hardship' narrowly."); *see also Salvador-Calleros v. Ashcroft*, 389 F.3d 959, 963 (9th Cir. 2004) (same).

c. Qualifying Relative

Under cancellation of removal, hardship to the applicant himself will no longer support a grant of relief. *See Vasquez-Zavala v. Ashcroft*, 324 F.3d 1105, 1107 (9th Cir. 2003) (comparing suspension of deportation, which allowed for hardship to the alien himself). The applicant must show the requisite degree of hardship to a "spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. § 1229b(b)(1)(D); *see also Molina-Estrada v. INS*, 293 F.3d 1089, 1093–94 (9th Cir. 2002) (because petitioner provided no evidence that his mother was a lawful permanent resident, he was not eligible for cancellation).

An adult daughter twenty-one years of age or older does not qualify as a "child" for purposes of cancellation of removal. *See Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1144–45 (9th Cir. 2002).

6. Exercise of Discretion

"Cancellation of removal, like suspension of deportation before it, is based on statutory predicates that must first be met; however, the ultimate decision whether to grant relief, regardless of eligibility, rests with the Attorney General." *Romero-Torres v. Ashcroft*, 327 F.3d 887, 889 (9th Cir. 2003). The court lacks jurisdiction to review the ultimate discretionary determination to deny cancellation. *See id*. at 890; *cf. Lopez-Alvarado v. Ashcroft*, 381 F.3d 847, 851 (9th Cir. 2004) (where IJ's denial of cancellation was based solely on the physical presence prong, even though she referenced discretionary factors, the court had jurisdiction over petition). "Although we may not review the IJ's exercise of discretion, a due process violation is not an exercise of discretion." *Reyes-Melendez v. INS*, 342 F.3d 1001, 1008 (9th Cir. 2003) (granting petition where IJ's biased remarks evinced the IJ's reliance on improper discretionary considerations); *cf. Martinez-Rosas v. Gonzales*, No. 04-36150, 2005 WL 2174477, at *3 (Sept. 9, 2005) ("[T]raditional abuse of discretion challenges recast as alleged due process violations do not constitute colorable constitutional claims that would invoke our jurisdiction.").

7. Dependents

When an adult alien has been granted cancellation, minor alien dependents may be able to establish eligibility for cancellation once the parent adjusts to lawful permanent resident status. *See In re Recinas*, 23 I. & N. Dec. 467, 473 (BIA 2002) ("find[ing] it appropriate to remand [minor respondents'] records to the Immigration Judge for their cases to be held in abeyance pending a disposition regarding the adult respondent's [adjustment of] status"); *Lopez-Alvarado v. Ashcroft*, 381 F.3d 847, 850 n.1 (9th Cir. 2004) (noting that if either petitioner is granted cancellation of removal, the minor son may be eligible for cancellation or other relief).

C. Ineligibility for Cancellation

8 U.S.C. § 1229b(c) lists specified aliens who are ineligible for cancellation of removal.

1. Certain Crewmen and Exchange Visitors

Crewmen who entered after June 30, 1964 are ineligible for cancellation of removal. *See* 8 U.S.C. § 1229b(c)(1); *see also Guinto v. INS*, 774 F.2d 991, 992 (9th Cir. 1985) (per curiam) (discussing identical bar to suspension of deportation, and rejecting equal protection challenge).

Certain nonimmigrant exchange aliens, as described in 8 U.S.C. § 1101(a)(15)(J), are also ineligible for relief. *See* 8 U.S.C. § 1229b(c)(2) and (3).

2. Security Grounds

Persons inadmissible or deportable under security and terrorism grounds are ineligible for cancellation of removal. *See* 8 U.S.C. § 1229b(c)(4) (referring to inadmissibility under 8 U.S.C. § 1182(a)(3) and deportability under 8 U.S.C. § 1227(a)(4)).

3. Persecutors

Individuals who have "ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's

race, religion, nationality, membership in a particular social group, or political opinion" are ineligible for cancellation of removal. *See* 8 U.S.C. § 1229b(c)(5) (referring to 8 U.S.C. § 1231(b)(3)(B)(i)).

4. Previous Grants of Relief

"An alien whose removal has previously been cancelled under this section or whose deportation was suspended under section 1254(a) of this title or who has been granted relief under section 1182(c) of this title, as such sections were in effect before September 30, 1996," is ineligible for cancellation. 8 U.S.C. § 1229b(c)(6).

D. Ten-Year Bars to Cancellation

1. Failure to Appear

Cancellation is unavailable for ten years if an applicant was ordered removed for failure to appear at a removal hearing, unless he or she can show exceptional circumstances for failing to appear. *See* 8 U.S.C. § 1229a(b)(7). The statute provides that the ten-year bar applies if the alien "was provided oral notice, either in the alien's native language or in another language the alien understands, of the time and place of the proceedings and of the consequences under this paragraph of failing" to appear. *Id.*

The statute defines exceptional circumstances as "circumstances (such as serious illness of the alien or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien." 8 U.S.C. § 1229a(e)(1).

Cross-reference: Motions to Reopen or Reconsider Immigration Proceedings, Time and Numerical Limitations, In Absentia Orders and Exceptional Circumstances.

2. Failure to Depart

Under 8 U.S.C. § 1229c(d), an applicant's failure to depart during the specified voluntary departure period will result in ineligibility for

cancellation of removal for a period of ten years. *Id.*; *see also Elian v. Ashcroft*, 370 F.3d 897, 900 (9th Cir. 2004) (order). "The order permitting the alien to depart voluntarily shall inform the alien of the penalties under this subsection." 8 U.S.C. § 1229c(d). "The plain language of 8 U.S.C. § 1229c(d) requires only that the order inform the alien of the penalties for failure to depart voluntarily[, and s]ervice of an order to the alien's attorney of record constitutes notice to the alien." *De Martinez v. Ashcroft*, 374 F.3d 759, 762 (9th Cir. 2004).

However, under the permanent rules, when an applicant files a timely motion to reopen within the voluntary departure period, along with a request for a stay of removal or voluntary departure, the voluntary departure period is tolled while the BIA is considering the motion to reopen. *See Azarte v. Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005). The *Azarte* court did not reach the question of whether filing a motion to reopen without a request for a stay of removal would toll the voluntary departure period. *See id.* at 1288 n.20; *cf. De Martinez v. Ashcroft*, 374 F.3d 759 (9th Cir. 2004) (denying petition for review in permanent rules case where petitioner moved to reopen to apply for adjustment of status 30 days after the expiration of her voluntary departure period); *Shaar v. INS*, 141 F.3d 953, 959 (9th Cir. 1998) (holding, in pre-IIRIRA case, that BIA may deny motion to reopen to apply for suspension of deportation because petitioners failed to depart during the voluntary departure period).

Cross-reference: Motions to Reopen or Reconsider Immigration Proceedings, Failure to Voluntarily Depart.

E. Numerical Cap on Grants of Cancellation and Adjustment of Status

IIRIRA limits the number of people who may receive cancellation of removal and adjustment of status to 4,000 per fiscal year. *See* 8 U.S.C. § 1229b(e); 8 C.F.R. § 1240.21(c); *see also Vasquez-Lopez v. Ashcroft*, 343 F.3d 961, 967 n.6 (9th Cir. 2003); *Barahona-Gomez v. Reno*, 167 F.3d 1228 (1999), *as supplemented by*, 236 F.3d 1115 (9th Cir. 2001).

F. NACARA Special-Rule Cancellation

On November 19, 1997, Congress passed the Nicaraguan Adjustment and Central American Relief Act ("NACARA"), which established special rules to permit certain classes of aliens to apply for what is known as "special rule cancellation." "Special Rule Cancellation allows designated aliens to qualify for cancellation under the more lenient suspension of deportation standard that existed before the passage of [IIRIRA]." *Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1093 (9th Cir. 2005); *see also Munoz v. Ashcroft*, 339 F.3d 950, 955–56 (9th Cir. 2003); *Simeonov v. Ashcroft*, 371 F.3d 532, 536 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 887 (2005); *Hernandez-Mezquita v. Ashcroft*, 293 F.3d 1161, 1162 (9th Cir. 2002); 8 C.F.R. §§ 1240.60–1240.70.

Special rule cancellation of removal is available for certain applicants from El Salvador, Guatemala, nationals of the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia. *See Ram v. INS*, 243 F.3d 510, 517 & n.9 (9th Cir. 2001).

NACARA section 203(c) allows an applicant one opportunity to file a motion to reopen his or her deportation or removal proceedings to obtain cancellation of removal. A motion to reopen will not be granted unless an applicant can demonstrate prima facie eligibility for relief under NACARA. *See Ordonez v. INS*, 345 F.3d 777, 785 (9th Cir. 2003). "An alien can make such a showing if he or she has complied with section 203(a)'s filing deadlines, is a native of one countries listed in NACARA, has lived continuously in the United States for ten years, has not been convicted of any crimes, is a person of good moral character, and can demonstrate extreme hardship if forced to return to his or her native country." *Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1093-94 (9th Cir. 2005); *see also* NACARA § 203(a), (b), and (c); 8 C.F.R. § 1003.43(b) (2004). "Such a showing need not be conclusive but need suggest only that it would be 'worthwhile' to reopen proceedings." *Id*. at 1094 (citing *Ordonez*, 345 F.3d at 785).

1. NACARA Does Not Violate Equal Protection

This court has held that NACARA special rule cancellation does not

violate equal protection. *See Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 602–03 (9th Cir. 2002); *Ram v. INS*, 243 F.3d 510, 517 (9th Cir. 2001); *see also Hernandez-Mezquita v. Ashcroft*, 293 F.3d 1161, 1164–65 (9th Cir. 2002) (holding that limitation on eligibility for relief based on whether an applicant filed an asylum application by the April 1, 1990 deadline did not violate equal protection or due process). *Id*. at 957.

2. NACARA Deadlines

NACARA section 203(a) identifies the threshold requirements for NACARA eligiblity. In order to qualify for relief, an applicant must have filed an asylum application by April 1, 1990 and must have applied for certain benefits by December 31, 1991. *Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1097 (9th Cir. 2005). Section 203(a)'s deadlines are statutory cutoff dates, and are not subject to equitable tolling. *See Munoz v. Ashcroft*, 339 F.3d 950, 956–57 (9th Cir. 2003) ("Statutes of repose are not subject to equitable tolling.").

Although section 203(c) does not identify by date the deadline for filing a motion to reopen deportation or removal proceedings to seek special rule cancellation, the Attorney General set the deadline at September 11, 1998. *See* NACARA § 203(c); 8 C.F.R. § 1003.43(e)(1); *Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1094 (9th Cir. 2005). An application for special rule cancellation of removal, to accompany the motion to reopen, must have been submitted no later than November 18, 1999. 8 C.F.R. § 1003.43(e)(2). NACARA section 203(c), which applies only to those aliens who have already complied with section 203(a)'s filing deadlines, is a statute of limitations subject to equitable tolling. *See Albillo-De Leon*, 410 F.3d at 1097-98; *compare Munoz v. Ashcroft*, 339 F.3d 950, 956–57 (9th Cir. 2003) (holding that section 203(a)'s deadlines are not subject to equitable tolling).

The numerical cap on the number of adjustments arising from cancellation and suspension in 8 U.S.C. § 1229b(e) does not apply to NACARA special rule cancellation. *See* 8 U.S.C. § 1229b(e)(3)(A).

3. Judicial review

The Ninth Circuit has not addressed the judicial review provision in section 309(c)(5)(C)(ii) of IIRIRA, as amended by section 203 of NACARA, which provides that "[a] determination by the Attorney General as to whether an alien satisfies the requirements of this clause (i) is final and shall not be subject to review by any court."

G. Abused Spouse or Child Provision

A battered spouse, battered child, or the parent of a battered child, may apply for a special form of cancellation of removal. *See* 8 U.S.C. § 1229b(b)(2); *see also Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1058-59 (9th Cir. 2005) (holding that the IJ violated due process in refusing to hear relevant expert testimony regarding domestic violence). An applicant for special rule cancellation must show:

> (1) that she had been 'battered or subjected to extreme cruelty' by a spouse who is or was a United States citizen or lawful permanent resident;
> (2) that she had lived continuously in the United States for the three years preceding her application;
> (3) that she was a person of 'good moral character' during that period;
> (4) that she is not inadmissible or deportable under various other specific immigration laws relating to criminal activity, including 8 U.S.C. § 1182(a)(2); and
> (5) that her removal 'would result in extreme hardship' to herself, her children, or her parents.

Lopez-Umanzor, 405 F.3d at 1053; *see also Hernandez v. Ashcroft*, 345 F.3d 824, 832 (9th Cir. 2003) (discussing similar suspension of deportation provision).

Cross-reference: Suspension of Deportation, Abused Spouse or Child Provision.

IV. SUSPENSION OF DEPORTATION, 8 U.S.C. § 1254 (repealed) (INA § 244)

A. Eligibility Requirements

Under the pre-IIRIRA rules, an applicant "would be eligible for suspension if (1) the applicant had been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of the application for suspension of deportation; (2) the applicant was a person of good moral character; and (3) deportation would result in extreme hardship to the alien or to an immediate family member who was a United States citizen or a lawful permanent resident." *Ramirez-Alejandre v. Ashcroft*, 320 F.3d 858, 862 (9th Cir. 2003) (en banc) (citing 8 U.S.C. § 1254(a)(1) (repealed)); *Alcaraz v. INS*, 384 F.3d 1150, 1153 (9th Cir. 2004).

Ten years of continuous physical presence was required for applicants deportable for serious crimes who could show exceptional and extremely unusual hardship. *See Leon-Hernandez v. INS*, 926 F.2d 902, 905 (9th Cir. 1991) (citing 8 U.S.C. § 1254(a)(2)); *Pondoc Hernaez v. INS*, 244 F.3d 752, 755 (9th Cir. 2001).

1. Continuous Physical Presence

Applicants for suspension must show that they have "been physically present in the United States for a continuous period of not less than seven years." 8 U.S.C. § 1254(a) (repealed 1996); *see also Ramirez-Alejandre v. Ashcroft*, 320 F.3d 858, 862 (9th Cir. 2003) (en banc). "[T]he relevant seven year period is the period immediately preceding service of the OSC that prompts the application for suspension." *Mendiola-Sanchez v. Ashcroft*, 381 F.3d 937, 941 (9th Cir. 2004) (rejecting petitioners' contention that they met the seven year requirement before departing to Mexico for five months).

a. Jurisdiction

The court retains jurisdiction over the determination of whether an

applicant has satisfied the seven-year continuous physical presence requirement. *See Kalaw v. INS*, 133 F.3d 1147, 1151 (9th Cir. 1997).

b. Standard of Review

"We review for substantial evidence the BIA's decision that an applicant has failed to establish seven years of continuous physical presence in the United States." *Vera-Villegas v. INS*, 330 F.3d 1222, 1230 (9th Cir. 2003).

c. Proof

An applicant may establish the time element by credible direct testimony or written declarations. *See Vera-Villegas v. INS*, 330 F.3d 1222, 1225 (9th Cir. 2003). Although contemporaneous documentation of presence "may be desirable," it is not required. *Id*.

d. Departures: 90/180 Day Rule

Under the transitional rules, an alien fails to maintain continuous physical presence if he is absent for more than 90 days, or 180 days in the aggregate. *See Mendiola-Sanchez v. Ashcroft*, 381 F.3d 937, 939 & n.2 (9th Cir. 2004). The Ninth Circuit has held that the 90/180 rule as applied to transitional rules cases is not impermissibly retroactive. *See id*. at 940-41.

Cross-reference: Cancellation for Non-Permanent Residents, Departure from the United States.

e. Brief, Casual, and Innocent Departures

Under pre-IIRIRA law, the statute allowed for "brief, casual and innocent" absences from the United States. 8 U.S.C. § 1254(b)(2) (repealed 1996); *see also Castrejon-Garcia v. INS*, 60 F.3d 1359, 1363 (9th Cir. 1995) (eight-day trip to Mexico seeking a visa was brief, casual and innocent); *Kamheangpatiyooth v. INS*, 597 F.2d 1253, 1258 (9th Cir. 1979) (holding that 30-day trip to Thailand to visit ailing mother did not necessarily break applicant's continuous physical presence); *cf. Hernandez-Luis v. INS*, 869

F.2d 496, 498–99 (9th Cir. 1989) (holding voluntary departure under threat of coerced deportation was not a brief, casual and innocent departure).

f. IIRIRA Stop-Time Rule

Under the IIRIRA "stop-time" rule, "any period of . . . continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear or an order to show cause why he or she should not be deported." *Arrozal v. INS*, 159 F.3d 429, 434 (9th Cir. 1998) (internal quotation marks omitted); *see also Lagandaon v. Ashcroft*, 383 F.3d 983, 988 (9th Cir. 2004) (holding in cancellation case that the date the notice to appear is served counts toward the period of continuous presence). "The stop-clock provision applies to all deportation and removal proceedings, whether they are governed by the transitional rules or the permanent rules." *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 598 (9th Cir. 2002).

The stop-time rule applies to suspension of deportation cases heard on or after April 1, 1997. *See Astrero v. INS*, 104 F.3d 264, 266 (9th Cir. 1996) (holding that IIRIRA's stop-time rule could not be applied before its effective date of April 1, 1997); *see also Otarola v. INS*, 270 F.3d 1272, 1273 (9th Cir. 2001) (granting petition where INS maintained meritless appeal in order to avail itself of stop-time rule); *Ram v. INS*, 243 F.3d 510, 517, 518 (9th Cir. 2001) (holding that the application of the new stop-time rule did not offend due process, and rejecting claim that 7 years can start anew after service of the OSC); *Guadalupe-Cruz v. INS*, 240 F.3d 1209, 1211 (9th Cir.) (reversing premature application of the stop-time rule), *corrected by* 250 F.3d 1271 (9th Cir. 2001).

g. Pre-IIRIRA Rule on Physical Presence

Before IIRIRA, an applicant "in deportation proceedings continued to accrue time towards satisfying the seven-year residency requirement for suspension of deportation during the pendency of the proceedings." *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 598 (9th Cir. 2002); *see also Alcaraz v. INS*, 384 F.3d 1150, 1153 (9th Cir. 2004). However, an applicant could not establish the seven-year requirement by pursuing baseless appeals. *See INS v. Rios-Pineda*, 471 U.S. 444, 449–50 (1985); *cf. Sida v. INS*, 783 F.2d 947,

950 (9th Cir. 1986) (distinguishing *Rios-Pineda*).

h. NACARA Exception to the Stop-Time Rule

The Nicaraguan Adjustment and Central American Relief Act ("NACARA") exempts certain applicants from El Salvador, Guatemala, and nationals of the former Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia, from the stop-time provision. *See Ram v. INS*, 243 F.3d 510, 517 (9th Cir. 2001); *see also Simeonov v. Ashcroft*, 371 F.3d 532, 537 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 887 (2005); *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 598 (9th Cir. 2002). For covered individuals, time accrued after issuance of a charging document may count towards the continuous physical presence requirement.

Cross-reference: Cancellation of Removal, NACARA Special-Rule Cancellation.

i. *Barahona-Gomez v. Ashcroft* Exception to the Stop-Time Rule

The stop-time rule also does not apply to class members covered by the December 2002 settlement of *Barahona-Gomez v. Ashcroft*, No. C97-0895 CW (N.D. Cal). This class action challenged the Executive Office for Immigration Review's directive to halt the granting of suspension applications during the period between February 13, and April 1, 1997, based on the annual cap on suspension grants.

Eligible *Barahona-Gomez* class members may apply for renewed suspension of deportation under the law as it existed prior to the effective date of IIRIRA. For background on the case, *see Barahona-Gomez v. Ashcroft*, 167 F.3d 1228 (9th Cir. 1999), *supplemented by* 236 F.3d 1115 (9th Cir. 2001); *see also* 68 Fed. Reg. 13727 (Mar. 20, 2003) (Advisory Statement); http://www.usdoj.gov/eoir/omp/barahona/barahona.htm (reproducing settlement agreement).

j. Repapering

For individuals who became ineligible for suspension of deportation based on the retroactive stop-time rule, a "safety-net provision" called "repapering" was included in section 309(c)(3) of IIRIRA. *See Alcaraz v. INS*, 384 F.3d 1150, 1152 (9th Cir. 2004). This section "permits the Attorney General to allow aliens who would have been eligible for suspension of deportation but for the new stop-time rule to be placed in removal proceedings where they may apply for cancellation of removal under 8 U.S.C. § 1229b, INA § 240A(b)." *Id*. at 1154 (remanding for determination of whether petitioners were eligible for repapering based on internal agency policy and practice) (emphasis omitted).

2. Good Moral Character

a. Jurisdiction

A moral character finding may be based on statutory or discretionary factors. *See Kalaw v. INS*, 133 F.3d 1147, 1151 (9th Cir. 1997) (discussing suspension of deportation). The court retains jurisdiction over statutory or "per se" moral character determinations. *See, e.g., Gomez-Lopez v. Ashcroft*, 393 F.3d 882, 884 (9th Cir. 2005) (holding that court retained jurisdiction to review finding that alien could not establish good moral character for purposes of cancellation of removal under section 1101(f)(7)); *Moran v. Ashcroft*, 395 F.3d 1089, 1091 (9th Cir. 2005) (holding that court retains jurisdiction over alien smuggling question in cancellation of removal case). However, the court lacks jurisdiction to review moral character determinations based on discretionary factors. *See Kalaw*, 133 F.3d at 1151.

b. Time Period Required

The applicant must show that he or she has been of good moral character for the entire statutory period. *See Limsico v. INS*, 951 F.2d 210, 213–14 (9th Cir. 1991) (declining to decide whether events occurring before

the seven-year period may be considered). Moreover, the BIA must make the moral character determination based on the facts as they existed at the time of the BIA decision. *See Ramirez-Alejandre v. Ashcroft*, 320 F.3d 858, 862 (9th Cir. 2003) (en banc).

Cross-reference: Cancellation for Non-Permanent Residents, Good Moral Character.

3. Extreme Hardship Requirement

a. Jurisdiction

Determination of extreme hardship "is clearly a discretionary act." *Kalaw v. INS*, 133 F.3d 1147, 1152 (9th Cir. 1997). The court is "no longer empowered to conduct an 'abuse of discretion' review of the agency's purely discretionary determinations as to whether 'extreme hardship' exists." *Torres-Aguilar v. INS*, 246 F.3d 1267, 1270 (9th Cir. 2001); *cf. Reyes-Melendez v. INS*, 342 F.3d 1001, 1006–07 (9th Cir. 2003) (holding that due process required remand where IJ's moral bias against petitioner precluded full consideration of the relevant hardship factors).

Cross-reference: Jurisdiction Over Immigration Petitions, Limitations on Judicial Review of Discretionary Decisions.

b. Qualifying Individual

Under the more lenient suspension standards, applicants could meet the extreme hardship requirement by showing hardship to himself or to his United States or lawful permanent resident spouse, parent or child. *See* 8 U.S.C. § 1254(a)(1) (repealed 1996); *see also Vasquez-Zavala v. Ashcroft*, 324 F.3d 1105, 1107 (9th Cir. 2003).

c. Extreme Hardship Factors

The administrative regulations describe extreme hardship as "a degree of hardship beyond that typically associated with deportation." 8 C.F.R. § 1240.58(b). The regulation sets forth the following non-exclusive list of

factors relevant to the hardship inquiry:

> (1) The age of the alien, both at the time of entry to the United States and at the time of application for suspension of deportation;
> (2) The age, number, and immigration status of the alien's children and their ability to speak the native language and to adjust to life in the country of return;
> (3) The health condition of the alien or the alien's children, spouse, or parents and the availability of any required medical treatment in the country to which the alien would be returned;
> (4) The alien's ability to obtain employment in the country to which the alien would be returned;
> (5) The length of residence in the United States;
> (6) The existence of other family members who are or will be legally residing in the United States;
> (7) The financial impact of the alien's departure;
> (8) The impact of a disruption of educational opportunities;
> (9) The psychological impact of the alien's deportation;
> (10) The current political and economic conditions in the country to which the alien would be returned;
> (11) Family and other ties to the country to which the alien would be returned;
> (12) Contributions to and ties to a community in the United States, including the degree of integration into society;
> (13) Immigration history, including authorized residence in the United States; and
> (14) The availability of other means of adjusting to permanent resident status.

Id. Although the court no longer has jurisdiction to review the IJ's hardship determination, numerous cases have discussed the relevant factors. *See, e.g., Chete Juarez v. Ashcroft*, 376 F.3d 944, 948-49 (9th Cir. 2004) (listing "broad range" of relevant circumstances in the hardship inquiry); *Arrozal v. INS*, 159 F.3d 429, 433–34 (9th Cir. 1998) (discussing, inter alia, medical

problems and political conditions); *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (per curiam) (considering family separation); *Ordonez v. INS*, 137 F.3d 1120, 1123–24 (9th Cir. 1998) (discussing persecution); *Urbina-Osejo v. INS*, 124 F.3d 1314, 1318–19 (9th Cir. 1997) (considering community assistance and acculturation); *Tukhowinich v. INS*, 64 F.3d 460, 463 (9th Cir. 1995) (considering non-economic hardship flowing from economic detriment); *Biggs v. INS*, 55 F.3d 1398, 1401–02 (9th Cir. 1995) (considering medical information); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1423–24 (9th Cir. 1987) (considering family separation); *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983) (per curiam) (considering hardship to applicant based on separation from non-qualifying relatives).

"Extreme hardship is evaluated on a case-by-case basis, taking into account the particular facts and circumstances of each case[, and a]djudicators should weigh all relevant factors presented and consider them in light of the totality of the circumstances." 8 C.F.R. § 1240.58(a); *see also Watkins v. INS*, 63 F.3d 844, 850 (9th Cir. 1995) (holding, pre-IIRIRA, that the BIA abuses its discretion when it does not consider all factors and their cumulative effect).

d. Current Evidence of Hardship

The BIA must decide eligibility for suspension "based, not on the facts that existed as of the time of the hearing before the IJ, but on the facts as they existed when the BIA issued its decision." *Ramirez-Alejandre v. Ashcroft*, 320 F.3d 858, 860, 875 (9th Cir. 2003) (en banc) (holding that the BIA's refusal to allow applicant to supplement the record with additional materials was a denial of due process); *see also Guadalupe-Cruz v. INS*, 240 F.3d 1209, 1212 (9th Cir.), *corrected by* 250 F.3d 1271 (9th Cir. 2001).

4. Ultimate Discretionary Determination

"Even if all three of these statutory criteria are met, the ultimate grant of suspension is wholly discretionary." *Kalaw v. INS*, 133 F.3d 1147, 1152 (9th Cir. 1997). "Thus, if the Attorney General decides that an alien's application for suspension of deportation should not be granted as a matter of discretion in addition to any other grounds asserted, the BIA's denial of

the alien's application would be unreviewable under the transitional rules." *Id*.; *see also Sanchez-Cruz v. INS*, 255 F.3d 775, 778–79 (9th Cir. 2001); *cf. Lopez-Alvarado v. Ashcroft*, 381 F.3d 847, 851 (9th Cir. 2004) (where IJ's denial of cancellation was based solely on the physical presence prong, even though she referenced discretionary factors, the court had jurisdiction over petition). "Although we may not review the IJ's exercise of discretion, a due process violation is not an exercise of discretion." *Reyes-Melendez v. INS*, 342 F.3d 1001, 1008 (9th Cir. 2003) (granting petition where IJ's biased remarks evinced the IJ's reliance on improper discretionary considerations).

B. Abused Spouses and Children Provision

A battered spouse, battered child, or the parent of a battered child, may apply for a special form of suspension added to the INA by the Violence Against Women Act of 1994 ("VAWA"). *See Hernandez v. Ashcroft*, 345 F.3d 824, 832 (9th Cir. 2003) (discussing 8 U.S.C. § 1254(a)(3)(1996)). Under this provision, the Attorney General may suspend the deportation of an alien who:

> 1) has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application;
> 2) has been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or lawful permanent resident;
> 3) proves that during all of such time in the United States the alien was and is a person of good moral character;
> 4) and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or the alien's parent or child.

Id.; *see also* 8 C.F.R. § 1240.58(c). The court retains jurisdiction to review the BIA's determination regarding whether an applicant was subjected to extreme cruelty. *See Hernandez*, 345 F.3d at 835 (holding that batterer's behavior during the "contrite" phase of the domestic violence cycle may constitute extreme cruelty).

Cross-reference: Cancellation of Removal, Abused Spouse or Child Provision.

C. Ineligibility for Suspension

1. Certain Crewmen and Exchange Visitors

Persons who entered as crewmen after June 30, 1964 are statutorily ineligible for suspension. *See* 8 U.S.C. § 1254(f)(1); *see also Guinto v. INS*, 774 F.2d 991, 992 (9th Cir. 1985) (per curiam) (rejecting equal protection challenge). Certain nonimmigrant exchange aliens are also ineligible for relief. *See* 8 U.S.C. § 1254(f)(2) and (3).

2. Participants in Nazi Persecutions or Genocide

The statute excludes aliens described in 8 U.S.C. § 1251(a)(4)(D) from eligibility for suspension of deportation. *See* 8 U.S.C. § 1254(a). Section 1251(a)(4)(D) incorporates the definitions of Nazi persecutors and those who engaged in genocide found in 8 U.S.C. § 1182(a)(3)(E)(i) & (ii).

3. Aliens in Exclusion Proceedings

Aliens in exclusion proceedings are ineligible for suspension of deportation. *See Simeonov v. Ashcroft*, 371 F.3d 532, 537 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 887 (2005).

D. Five-Year Bars to Suspension

1. Failure to Appear

An individual is not eligible for suspension of deportation for a period of five years if, after proper notice, she failed to appear at a deportation or asylum hearing, or failed to appear for deportation. *See* 8 U.S.C. § 1252b(e) (repealed 1996). The five-year ban also applies to voluntary departure and adjustment of status. *Id.* at § 1252(b)(e)(5). The government must provide proper notice in order for the bar to relief to be effective. *See Lahmidi v. INS*, 149 F.3d 1011, 1015–16 (9th Cir. 1998) (reviewing denial of motion to

reopen in absentia deportation proceeding).

The pre-IIRIRA version of the statute provided an exception to the five-year bar for "exceptional circumstances." *See* 8 U.S.C. § 1252b(e). Exceptional circumstances are defined as "circumstances (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien." 8 U.S.C. § 1252b(f)(2).

2. Failure to Depart

An individual is not eligible for suspension of deportation for a period of five years if she remained in the United States after the expiration of a grant of voluntary departure. *See* 8 U.S.C. § 1252b(e)(2)(A) (repealed 1996); *see also Shaar v. INS*, 141 F.3d 953, 959 (9th Cir. 1998) (holding under transitional rules that BIA may deny motion to reopen to apply for suspension of deportation because petitioners failed to depart during the voluntary departure period); *cf. Azarte v. Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005) (holding in cancellation case that when an applicant files a timely motion to reopen within the voluntary departure period, along with a request for a stay of removal or voluntary departure, the voluntary departure period is tolled while the BIA is considering the motion to reopen).

The five-year ban will not apply unless "the Attorney General has provided written notice to the alien in English and Spanish and oral notice either in the alien's native language or in another language the alien understands of the consequences . . . of the alien's remaining in the United States after the scheduled date of departure, other than because of exceptional circumstances." 8 U.S.C. § 1252b(e)(2)(B). The IJ's oral warning of the consequences of failing to depart must explicitly identify the types of discretionary relief that would be barred. *See Ordonez v. INS*, 345 F.3d 777, 783–84 (9th Cir. 2003) (reviewing, under the transitional rules, the denial of petitioner's motion to reopen suspension proceedings); *cf. De Martinez v. Ashcroft*, 374 F.3d 759, 762 (9th Cir. 2004) (suggesting in permanent rules cancellation case that the new ten-year statutory bar for failing to voluntarily depart no longer explicitly requires oral notice of the consequences for failing to depart).

Cross-reference: Motions to Reopen or Reconsider Immigration Proceedings, Time and Numerical Limitations, In Absentia Orders and Exceptional Circumstances.

V. SECTION 212(c) RELIEF, 8 U.S.C. § 1182(c) (repealed)

A. Overview

Former INA section 212(c), 8 U.S.C. § 1182(c), allowed certain long-time permanent residents to obtain a discretionary waiver for certain grounds of excludability and deportability. *See INS v. St. Cyr*, 533 U.S. 289, 294–95 (2001) (providing history of former section 212(c) relief).

Section 212(c) provided that "[a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provision of subsection (a) [classes of excludable aliens]." 8 U.S.C. § 1182(c) (repealed 1996); *St. Cyr*, 533 U.S. at 295. If former section 212(c) relief was granted, the deportation proceedings would be terminated, and the alien would remain a lawful permanent resident. *See United States v. Ortega-Ascanio*, 376 F.3d 879, 882 (9th Cir. 2004).

Although the literal language of former section 212(c) applies only to exclusion proceedings, the statute applies to aliens in deportation proceedings as well. *See St. Cyr*, 533 U.S. at 295–96 & n.5 (discussing the "great practical importance" of extending former § 212(c) relief to permanent resident aliens in deportation proceedings, and noting the large percentage of applications that have been granted); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1122 (9th Cir. 2002); *Ortega de Robles v. INS*, 58 F.3d 1355, 1358 (9th Cir. 1995).

Effective April 1, 1997, IIRIRA repealed section 212(c), and created a new and more limited remedy called "cancellation of removal for certain permanent residents." However, certain individuals, as discussed below,

remain eligible to apply for a section 212(c) waiver. *See* 8 C.F.R. § 1212.3 (final rule establishing procedures to implement *St. Cyr*).

Cross-reference: Cancellation for Lawful Permanent Residents.

B. Eligibility Requirements

1. Seven Years

To be eligible for discretionary relief from deportation under former section 212(c), an applicant must have accrued seven years of lawful permanent residence status. *See Ortega de Robles v. INS*, 58 F.3d 1355, 1360–61 (9th Cir. 1995) (holding that applicant could include time spent as a lawful temporary resident under the amnesty program). An applicant could continue to accrue legal residency time for the purpose of relief while pursuing an administrative appeal. *See Foroughi v. INS*, 60 F.3d 570, 572 (9th Cir. 1995); *Lepe-Guitron v. INS*, 16 F.3d 1021, 1026 (9th Cir. 1994) (holding that a parent's lawful unrelinquished domicile is imputed to his or her minor children).

2. Balance of Equities

The IJ or BIA must balance the favorable and unfavorable factors when determining whether an applicant is entitled to former section 212(c) relief. *See, e.g.*, *Georgiu v. INS*, 90 F.3d 374, 376–77 (9th Cir. 1996) (per curiam) (reversing BIA where it failed to address positive equities). Under the IIRIRA transitional rules, the court lacks jurisdiction to review the discretionary balancing of the relevant factors. *See Palma-Rojas v. INS*, 244 F.3d 1191, 1192 (9th Cir. 2001) (per curiam). However, numerous cases have discussed the equities and adverse factors that should be balanced. *See, e.g.*, *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1051 (9th Cir. 2004) (discussing positive equities and holding that defendant had a plausible claim for former § 212(c) relief); *United States v. Gonzalez-Valerio*, 342 F.3d 1051, 1056–57 (9th Cir. 2003) (holding that defendant did not establish prejudice given the significant adverse factors in his case); *Pablo v. INS*, 72 F.3d 110, 113–14 (9th Cir. 1995) (holding, under abuse of discretion standard, that BIA considered all of the relevant factors); *Yepes-Prado v.*

INS, 10 F.3d 1363, 1366 (9th Cir. 1993) (listing factors).

Former section 212(c) does not require a showing of good moral character or extreme hardship. *See* 8 U.S.C. § 1182(c); *see also Castillo-Felix v. INS*, 601 F.2d 459, 466 (9th Cir. 1979) (comparing the stricter qualitative requirements for suspension of deportation), *limited on other grounds by Ortega de Robles v. INS*, 58 F.3d 1355, 1358–59 (9th Cir. 1995).

C. Comparable Ground of Exclusion

Because former section 212(c) explicitly applies to the grounds of excludability, in order to be eligible for a waiver, an applicant in deportation proceedings must show that his ground of deportation has an analogous exclusion ground. *See Komarenko v. INS*, 35 F.3d 432, 434–35 (9th Cir. 1994) (stating that the waiver was not available for deportation based on a firearms offense because there was no comparable exclusion ground); *see also* 8 C.F.R. § 1212.3(f)(5) ("An application for relief under former section 212(c) of the Act shall be denied if: . . .[t]he alien is deportable under former section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act.").

D. Ineligibility for Relief

Former section 212(c) relief is not available to persons based on certain national security, terrorist, or foreign policy grounds, or if the applicant participated in genocide or child abduction. *See* 8 U.S.C. § 1182(c) (referring to sections 1182(a)(3) and 1182(a)(9)(C)). The court has held that there is no impermissibly retroactive effect in applying IIRIRA's elimination of section 212(c) relief to individuals who engaged in the requisite terrorist activity prior to IIRIRA's enactment. *Kelava v. Gonzales*, 410 F.3d 625, 630 (9th Cir. 2005) (mandate pending).

E. Statutory Changes to Former Section 212(c) Relief

1. IMMACT 90

The Immigration Act of 1990 ("IMMACT 90") amended Section 212(c) to eliminate relief for aggravated felons who had served a term of imprisonment of at least five years. *See INS v. St. Cyr*, 533 U.S. 289, 297 (2001); *Toia v. Fasano*, 334 F.3d 917, 919 (9th Cir. 2003). "Section 212(c) was further revised in 1991 to clarify that the bar applied to multiple aggravated felons whose aggregate terms of imprisonment exceeded five years." *Toia*, 334 F.3d at 919 n.1. Accordingly, under IMMACT 90, an applicant convicted of an aggravated felony could qualify for former section 212(c) relief, unless he had served a prison term of at least five years. *See id*.

a. No Retroactive Application

The *Toia* court also held that the IMMACT 90 five-year bar may not be applied retroactively to convictions before November 29, 1990. *Id.* at 918–19; *see also Angulo-Dominguez v. Ashcroft*, 290 F.3d 1147, 1152 (9th Cir. 2002) (remanding for a determination of whether application of five-year bar was impermissibly retroactive); 8 C.F.R. § 1212.3(f)(4)(ii) ("An alien is not ineligible for section 212(c) relief on account of an aggravated felony conviction entered pursuant to a plea agreement that was made before November 29, 1990.").

2. AEDPA

Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") severely restricted former section 212(c) relief to bar waivers for applicants convicted of most crimes, including those who had aggravated felonies (regardless of the length of their sentences), or those with convictions for controlled substances offenses, drug addiction or abuse, firearms offenses, two crimes of moral turpitude, or miscellaneous crimes relating to national security. *See INS v. St. Cyr*, 533 U.S. 289, 297 & n.7 (2001); *United States v. Leon-Paz*, 340 F.3d 1003, 1005 (9th Cir. 2003); *Magana-Pizano v. INS*, 200 F.3d 603, 606 & n.2 (9th Cir. 1999).

An aggravated felony not listed in the notice to appear can serve as a bar to former 212(c) relief. *See United States v. Gonzalez-Valerio*, 342 F.3d 1051, 1055–56 (9th Cir. 2003).

a. Continued Eligibility for Relief

Under final administrative regulations promulgated after the Supreme Court's ruling in *INS v. St. Cyr*, aliens in deportation proceedings before April 24, 1996 may apply for former section 212(c) relief without regard to section 440(d) of AEDPA. *See* 8 C.F.R. § 1212.3(g).

AEDPA § 440(d) also does not apply "if the alien pleaded guilty or nolo contendere and the alien's plea agreement was made before April 24, 1996." *Id.* at 1212.3(h)(1).

If the alien entered a plea agreement between April 24, 1996 and April 1, 1997, he may apply for former section 212(c) relief, as amended by § 440(d) of AEDPA. *Id.* at 1212.3(h)(2).

3. IIRIRA

Section 304(b) of IIRIRA eliminated section 212(c) relief entirely, and replaced it with a new form of relief called cancellation of removal. *See INS v. St. Cyr*, 533 U.S. 289, 297 (2001); *United States v. Velasco-Medina*, 305 F.3d 839, 843 (9th Cir. 2002). Individuals who entered into plea agreements on or after April 1, 1997 are not eligible for former section 212(c) relief. *See* 8 C.F.R. § 1212.3(h)(3).

Cross-reference: Cancellation of Removal.

a. Continued Eligibility for Relief

In *INS v. St. Cyr*, 533 U.S. 289 (2001), the Supreme Court held that a retrospective application of the bar to former section 212(c) relief would have an impermissible retroactive effect on certain lawful permanent residents. *Id.* at 325 (holding that the elimination of § 212(c) relief had an "obvious and severe retroactive effect" on those who entered into plea

agreements with the expectation that they would be eligible for relief). More specifically, "IIRIRA's elimination of any possibility of § 212(c) relief for people who entered into plea agreements with the expectation that they would be eligible for such relief clearly attaches a new disability, in respect to transactions or considerations already past." *Id.* at 321 (internal quotation marks omitted). Accordingly, applicants who were convicted pursuant to plea agreements before AEDPA and IIRIRA, and who were eligible for former section 212(c) relief at the time of their guilty pleas, remain eligible to apply for relief. *Id.* at 326; *see also Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1118 n.1 (9th Cir. 2002) (stating that repeal of § 212(c) relief did not apply to alien falling under the transitional rules); *see also* 8 C.F.R. § 1003.44 (setting forth procedure for special motion to seek former section 212(c) relief) and 8 C.F.R. § 1212.3(h) (setting forth continued availability of former section 212(c) relief).

b. Inapplicability to Convictions After Trial

Individuals who were convicted after trial are not eligible for former section 212(c) relief. *See Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002) (holding that because the applicant elected a jury trial, the AEDPA restrictions on former section 212(c) relief did not have an impermissibly retroactive effect; and finding no equal protection violation); *see also United States v. Herrera-Blanco*, 232 F.3d 715, 719 (9th Cir. 2000) (finding no impermissible retroactive effect where applicant was convicted after a jury trial); 8 C.F.R. § 1212.3(h) ("Aliens are not eligible to apply for section 212(c) relief under the provisions of this paragraph with respect to convictions entered after trial.").

c. Inapplicability to Terrorist Activity

The elimination of section 212(c) relief has no impermissibly retroactive effect where a petitioner engaged in the requisite terrorist activity prior to IIRIRA's enactment and his removability depended on that activity, rather than his conviction. *See Kelava v. Gonzales*, 410 F.3d 625, 630 (9th Cir. 2005) (mandate pending).

F. Expanded Definition of Aggravated Felony

Section 321 of IIRIRA also expanded the list of crimes defined as "aggravated felonies." *See, e.g., United States v. Velasco-Medina,* 305 F.3d 839, 843 (9th Cir. 2002) (noting that "IIRIRA expanded the definition of 'aggravated felony' by [inter alia] reducing the prison sentence required to trigger 'aggravated felony' status for burglary from five years to one year."); *see also INS v. St. Cyr*, 533 U.S. 289, 296 n.4 (2001); 8 U.S.C. § 1101(a)(43) (providing definition of aggravated felony); 8 C.F.R. § 1212.3(f)(4) (discussing applicability of aggravated felony exclusion).

Cross-reference: Criminal Issues in Immigration Law, Aggravated Felonies.

G. Application of Retroactivity Analysis

In *United States v. Leon-Paz,* 340 F.3d 1003, 1007 (9th Cir. 2003), the court held that a defendant who pled guilty to burglary in October 1995 was entitled to be considered for former section 212(c) relief because at the time of his plea, he did not have notice that section 212(c) relief would not be available in the event his conviction was reclassified as an aggravated felony.

In *United States v. Velasco-Medina*, 305 F.3d 839, 850 (9th Cir. 2002), the court held that the elimination of former section 212(c) relief was not impermissibly retroactive where defendant's June 1996 guilty plea for burglary did not make him deportable under the law in effect at the time of the plea, and he had notice that AEDPA had already eliminated relief for aggravated felons. *See also Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1053-54 (9th Cir. 2005); *Cordes v. Gonzales*, 421 F.3d 889, 894-95 (9th Cir. 2005) (holding that petitioner could not have had settled expectations as to the continued availability of 212(c) relief at the time she entered her guilty plea for (then) deportable offenses because the passage of section 440(d) of AEDPA predated her conviction).

In *Servin-Espinoza v. Ashcroft*, 309 F.3d 1193, 1199 (9th Cir. 2002), the court held that the INS policy of allowing excludable aliens, but not

deportable aliens, to apply for former section 212(c) relief violated equal protection. *Id.* (affirming a grant of habeas relief to a lawful permanent resident aggravated felon who was precluded from applying for former section 212(c) relief during the time when the BIA allowed excludable aggravated felons to apply for such relief).

In *Cordes v. Gonzales*, 421 F.3d 889, 895-96 (9th Cir. 2005), the court held that the retroactive application of section 321 of IIRIRA is rationally related to a legitimate government purpose and therefore does not violate due process. However, the court further held in *Cordes* that retroactive application of section 321 of IIRIRA violates equal protection because the current judicially defined limits of the availability of section 212(c) relief post-IIRIRA, as applied by the Bureau of Immigration and Customs Enforcement, create an irrational result that affords discretionary relief from removal to legal permanent residents who have committed worse crimes than similarly situated permanent residents like petitioner. *See Cordes*, 421 F.3d at 896-99 (9th Cir. 2005); *cf. Alvarez-Barajas v. Gonzales*, 418 F.3d at 1054 (denying petition for review challenging the retroactive application of IIRIRA's expanded aggravated felony definition).